No. 49198-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS MACKEY II,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Washington Supreme Court Cases

Washington Court of Appeals Cases

Rules

A. ARGUMENT

1. The admission of Mr. Mackey's inculpatory statement, "That was months ago!," violated his constitutional rights and requires reversal.

Absent a valid waiver of a person's Miranda rights, statements elicited during custodial interrogation are inadmissible. Miranda v. Arizona, 384 U.S. 436, 475, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). After arresting Mr. Mackey, an officer told Mr. Mackey he was arrested for an incident that occurred on March 10, 2015 involving Ms. Anderson. CP 103-104 (FF 1.1, 1.3-1.4). Mr. Mackey responded, 'That was months ago!" CP 104 (FF 1.5). Because this incriminating statement was elicited from Mr. Mackey while he was in custody and without a waiver of his Miranda rights, the trial court erred in admitting it. And because the error is not harmless beyond a reasonable doubt, the convictions should be reversed.

The State argues that Mr. Mackey waived this claim because he did not make this same precise argument below at the CrR 3.5 hearing. Br. of Resp't at 9-11. The CrR 3.5 hearing, however, was mandatory and its purpose was to determine whether the statements made by Mr. Mackey were admissible. CrR 3.5(a). Contrary to the State's contention, Mr. Mackey did not agree that the statement was admissible. Rather, defense counsel stated (rather confusingly) that he did not know if a Miranda

warning was required and was not disagreeing that Mr. Mackey actually made the statement:

> Your Honor, our position on that simply is that it appears there were no Miranda warnings given, but I don't know that they would have had to be under that circumstance so I don't think we're contesting that he made that particular statement.

RP 89. The trial court did not understand this to be a concession. Rather, the trial court immediately ruled the statement was admissible because it was "spontaneous." RP 89.

In support of its waiver argument, the State cites State v. Fanger, 34 Wn. App. 635, 663 P.2d 120 (1983) and State v. Rice, 24 Wn. App. 562, 603 P.2d 835 (1979). In Fanger, no CrR 3.5 hearing was held and the defendant validly waived the CrR 3.5 hearing. Fanger, 34 Wn. App. at 637. Similarly, in Rice, no CrR 3.5 hearing was held and the defendant expressly agreed to the admission of the statement at issue. Rice, 24 Wn. App. at 566-57.

In contrast, here the trial court held a CrR 3.5 hearing and ruled that Mr. Mackey's inculpatory statement was admissible based on a determination that it was not elicited by "interrogation" because it was "spontaneous." Mr. Mackey is squarely challenging this ruling on appeal, as he is entitled to. The error is not waived.

Even if the claim were not preserved, this Court will not decline to review an issue if it qualifies as manifest error affecting a constitutional right. RAP 2.5(a)(3). To make this determination, the appellate court asks: "(1) Has the party claiming error shown the error is truly of a constitutional magnitude, and if so, (2) has the party demonstrated that the error is manifest?" State v. Kalebaugh, 183 Wn.2d 578, 583, 355 P.3d 253 (2015).

Here, the claimed error is plainly constitutional. It is also "manifest." To be "manifest," there must be a showing of "actual prejudice," meaning "that the claimed error had practical and identifiable consequences in the trial." State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). This standard is satisfied when "the record shows that there is a fairly strong likelihood that serious constitutional error occurred." Id. The appellate court may examine whether the trial court could have corrected the error. Kalebaugh, 183 Wn.2d at 583. The analysis previews the claim and should not be confused with establishing an actual violation. Lamar, 180 Wn.2d at 583.

To qualify as manifest, the record should contain the necessary facts to adjudicate the claim. Id. Here, all the necessary facts are in the record. Nothing else is needed to adjudicate the issue. The error also had practical and identifiable consequences because Mr. Mackey's statement

was cited by the prosecutor during both opening and closing arguments. RP 148-49, 466. The prosecutor argued the statement proved Mr. Mackey was guilty of the offenses. RP 466. Accordingly, the claimed error is manifest and is properly before this Court. See State v. Randmel, 196 Wn. App. 1055 (2016) (unpublished) (addressing issue concerning right against incrimination even though issue was not raised at CrR 3.5 hearing), review denied, 187 Wn.2d 1028, 391 P.3d 445 (2017).[1]

On the merits, the State defends the trial court's ruling by arguing that that there was no "interrogation." "Interrogation" refers to "any words or actions" that a person "should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). Here, the officer's statement about the reasons for the arrest were directed at Mr. Mackey and were reasonably likely to elicit an incriminating response. Br. of App. at 14-16; see In re Pers. Restraint of Cross, 180 Wn.2d 664, 684-86, 327 P.3d 660 (2014) (officer's comment to suspect constituted

[1] This case has no precedential value, but may have persuasive value. GR 14.1; Crosswhite v. Washington State Dep't of Soc. & Health Servs., 197 Wn. App. 539, 544, 389 P.3d 731 (2017).

interrogation because all the possible replies, including silence, were potentially incriminating). Thus, there was "interrogation."

In arguing otherwise, the State maintains that Mr. Mackey's statement was "spontaneous." Br. of Resp't at 12-14. The trial court, however, found that Mr. Mackey "responded" to Deputy Shields' statement to Mr. Mackey that "he was being arrested for an incident that occurred on March 10, 2015 involving [Ms. Anderson]." CP 104 (FF 1.4, 1.5). Thus, his statement was not "spontaneous." See Cross, 180 Wn.2d at 686 (specific response to a statement was not "irrelevant outburst").

The State appears to argue that statements made to suspects attendant to arrest are never likely to elicit an incriminating response and therefore never constitute "interrogation." Br. of Resp't at 12-13. But here the statement by the officer was made while Mr. Mackey was handcuffed and secured in a patrol car. CP 104 (FF 1.3, 1.4). He was already arrested.

In support of its analysis, the State relies on State v. McIntyre, 39 Wn. App. 1, 691 P.2d 587 (1984) and State v. Sadler, 147 Wn. App. 97, 193 P.3d 1108 (2008). Neither case is on point. In McIntyre, the defendant made a statement as he was being escorted away from a house after being arrested. McIntyre, 39 Wn. App. at 4. The opinion does not memorialize what law enforcement said to the defendant. As for Sadler,

there the defendant made a statement after being told by a detective that he intended to get a search warrant. Sadler, 147 Wn. App. at 131. That is not analogous to telling a suspect the details for why the officer arrested the suspect. Here, the officer did not merely tell Mr. Mackey about the status of the officer's investigation. Cf. id. The State's arguments should be rejected.

The error is not harmless beyond a reasonable doubt. Br. of App. 15-17. The State has not argued otherwise. Thus, the State has not carried its burden and all of Mr. Mackey's convictions should be reversed. Lamar, 180 Wn.2d at 588 ("The State makes no attempt in its briefing to this court to show harmless error, and accordingly the presumption of prejudice stands.").

2. Juries must be unanimous as to the act constituting the offense. Because the jury was not instructed that it must be unanimous as to the act constituting fourth degree assault and the prosecutor did not elect any act, that conviction must be reversed.

The accused has a constitutional right to a unanimous jury verdict. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). When there is evidence of multiple acts that could constitute the charged crime, the jury must all agree as to which act constitutes the crime. Id. To ensure that this right is not violated, the jury must be provided with a unanimity

instruction or the prosecutor must tell the jury it is electing to rely on a specific act. Id.

Here, as to count 2, the jury convicted Mr. Mackey of the lesser included offense of fourth degree assault. CP 86. The jury, however, was not instructed it must be unanimous on the act constituting fourth degree assault.[2] Neither did the prosecutor elect a particular assaultive act. RP 458-59. Accordingly, Mr. Mackey's right to a unanimous jury verdict was violated.

The State argues this Court should disregard the foregoing claim because it is unpreserved. Br. of Resp't at 15-16. The claim, however, is properly raised for the first time on appeal as a matter of right because it concerns a manifest constitutional error. State v. Bobenhouse, 166 Wn.2d 881, 892 n.4, 214 P.3d 907 (2009) (reviewing issue concerning lack of unanimity instruction); RAP 2.5(a)(3).

The State agrees the claim is constitutional, but disagrees with Mr. Mackey that the claimed error is "manifest." Br. of Resp't at 15. The State does not explain why review was warranted in Bobenhouse under RAP 2.5(a)(3) on this type of issue, but not in this case. Br. of App. at 19,

[2] The State asserts that Mr. Mackey "agreed no unanimity instruction was required." Br. of Resp't at 16. The State does not cite to the record in support of its contention. To the contrary, Mr. Mackey simply did not object to the lack of such an instruction as to count 2. RP 398. He did not affirmatively agree to it.

n.9 (citing Bobenhouse as authority for why error should be reviewed). This Court is bound to follow our State Supreme Court on issues of state law. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Under Bobenhouse, the court should review the claim.

The State contends the issue is not "manifest" because it is not obvious that the trial court could have corrected the error. The State argues "the trial court would not reasonably have expected any argument that the singular act of strangulation for which the State sought a conviction in count 2 would not be the same act it relied upon for the lesser included in count 2." Br. of Resp't at 16.

This argument is flawed. The issue of a unanimity instruction on count 2 was actually considered by the trial court. RP 398. Like the prosecutor, however, the court did not analyze whether a unanimity instruction would be necessary if the jury reached the lesser included offense of fourth degree assault. RP 398. Rather, the court analyzed the issue as if there were no lesser included offense instruction. RP 398. The court should have spotted the potential problem. Cf. Kalebaugh, 183 Wn.2d 583 (jury instruction misstating the law on the meaning of "beyond a reasonable doubt" qualified as "manifest" because "the trial court should have known" this was a misstatement). Moreover, there would have been

no error if the prosecutor had made a clear election as to the lesser included offense of fourth degree assault on count 2.

Reading the instructions and following the prosecutor's closing argument, the jurors could have reasonably concluded that unanimity was not required on the lesser included offense in count 2, and convicted Mr. Mackey based on different assaultive acts. Thus, the record shows the claimed error is "manifest."

In support of its analysis, the State cites State v. McNearney, 193 Wn. App. 136, 373 P.3d 265 (2016). There, the defendant sexually assaulted a waitress by grabbing her privates twice in a restaurant over a span of about five minutes. McNearney, 193 Wn. App. at 139. He was charged with one assault, not two. Id. at 138. This Court reasoned that the lack of a unanimity instruction was not manifest error, reasoning "it was not at all apparent that the two touchings could be viewed as separate acts, as opposed to a continuing course of conduct." Id. at 143.

This case is different. There were two assault charges. The evidence concerning multiple assaultive acts spanned days, not minutes. And unlike in McNearney, the trial court was actually aware of the potential unanimity problem. RP 398.

As to the merits, the State largely agrees with Mr. Mackey on the law and the facts. Br. of Resp't at 14-18. The State claims, however, that

it made a valid election as to count 2. Br. of Resp't at 17. It is true that the prosecutor made an election as to the charge of second degree assault in count 2, which concerned strangulation. RP 458-59. But the prosecutor did not make an election as to the lesser included offense of fourth degree assault. RP 459. All the prosecutor said about the lesser included was that "you only get to that if you first find not guilty of strangulation." RP 459. The State cites no authority in support of its positon that an election on the greater offense is necessarily an election as to the lesser included offense. The jury certainly was not told this in its instructions and would not have reasonably understood this to be the case. See City of Seattle v. Pearson, 192 Wn. App. 802, 821, 369 P.3d 194 (2016) (jury instructions should permit the parties to argue their theories of the case, not mislead the jury, and properly inform the jury of the applicable law). The State's position should be rejected.

The State does not argue the error is harmless. Br. of Resp't at 18. As argued, the error is prejudicial. Br. of App. at 20-21. The conviction for fourth degree assault should be reversed.

3. The conviction for fourth degree assault violates double jeopardy and should be vacated.

As argued in the Opening Brief, the conviction for fourth degree assault potentially offends double jeopardy because it may be based on the

same act constituting the second degree assault. Br. of App. at 22-26. Because the record does not show that it is manifestly apparent that the conviction for fourth degree assault is based on an act separate and distinct from the conviction for second degree assault, the conviction must be vacated. See State v. Mutch, 171 Wn.2d 646, 664, 254 P.3d 803 (2011); State v. Borsheim, 140 Wn. App. 357, 370-71, 165 P.3d 417 (2007).

The State's opposing argument is mostly unresponsive. Br. of Resp't at 18-21. The State fails to address Borsheim or Mutch. The State does not grapple with the actual issue, which is whether Mr. Mackey's right to be free from double jeopardy was violated because the jury instructions exposed him to multiple punishments for the same offense. See Borsheim, 140 Wn. App. at 366. Instead, the State merely provides a recitation of the evidence and argues there was evidence showing separate and distinct assaultive acts. Br. of Resp't at 20-21. In Borsheim, however, there was evidence of multiple distinct acts of rape. Borsheim, 140 Wn. App. at 363. Still, this Court held there was a double jeopardy violation because the jury instructions permitted the jury to base the multiple convictions on the same acts. Id. at 370.

The same is true in this case. Accordingly, the conviction for fourth degree assault should be vacated. Br. of App. at 26

4. The evidence did not prove beyond a reasonable doubt that Mr. Mackey unlawfully imprisoned Ms. Anderson. The conviction should be dismissed.

As argued, the State failed to prove beyond a reasonable doubt that Mr. Mackey committed unlawful imprisonment. Br. of App. at 27-30.

The State appears to agree with Mr. Mackey on the relevant law. Br. of Resp't at 22-23. The State does not disagree that to prove the offense, it bore the burden of proving beyond a reasonable doubt that Ms. Anderson was actually restrained by intimidation from Mr. Mackey. Br. of App. at 29-30. This required proof of Ms. Anderson's state of mind. Br. of App. at 29.

The State did not meet its burden because there was no testimony from Ms. Anderson that she was intimidated by Mr. Mackey into not leaving the home. Br. of App. at 30. The State does not disagree that it never elicited this necessary testimony from Ms. Anderson. Br. of Resp't at 23-24.

The State emphasizes Ms. Anderson's statement that Mr. Mackey told her she could not leave until her bruises were healed. Br. of Resp't at 23. But Ms. Anderson did not testify that this intimidated her into not leaving. In fact, she testified she did not leave because she was unfamiliar with the area and she did not call anyone else for a ride because she did

not want to get Mr. Mackey in trouble. RP 161, 187. She later freely left the residence without Mr. Mackey trying to stop her. RP 171-72.

At best, the foregoing evidence constitutes a "modicum" or "scintilla" of evidence indicating restraint. Due process and the beyond the reasonable doubt standard, however, demand more. Jackson v. Virginia, 443 U.S. 307, 320, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("modicum" of evidence does not meet sufficiency of evidence standard in criminal cases); see State v. Harris, 14 Wn. App. 414, 418, 542 P.2d 122 (1975) (deputy's testimony that he obtained trunk keys from either the husband or the wife was a mere "scintilla of evidence" insufficient to establish dominion and control by the wife over the trunk's contents).

The State argues the prior acts of domestic violence proved "restraint." More is needed. There was no testimony from Ms. Anderson that she was intimidated into not leaving because of her history with Mr. Mackey. While a history of domestic violence may be probative, it is purely speculative to conclude that Ms. Anderson was intimidated by Mr. Mackey into not leaving due this history. See State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013) ("[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.").

The State failed to prove with sufficient evidence the crime of unlawful imprisonment. This Court should reverse and order that conviction dismissed.

B. CONCLUSION

The unlawful imprisonment conviction should be dismissed for insufficient evidence. The remaining convictions should be reversed due the constitutional error in admitting Mr. Mackey's inculpatory statement. Independent of the foregoing, the conviction for fourth degree assault should be reversed because of the unanimity and double jeopardy violations.

DATED this 21st day of June, 2017.

Respectfully submitted,

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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 49198-8-II
v.	)	
	)	
DOUGLAS MACKEY II,	)	
	)	
Appellant.	)	

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